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No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1948

WILLIAM FARRELL, PETITIONER

v.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION, LUCKENBACH STEAMSHIP COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (R. 280–289) is reported at 167 F. 2d 781.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1948 (R. 290). A petition for rehearing was denied on June 11, 1948 (R. 296). The petition for a writ of certiorari was filed September 9, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the courts below erred in declining to award to a seaman who has sustained permanent injuries a lump sum as future maintenance and cure.

2. Whether a seaman who joins a crew already under shipping articles for a foreign voyage "and back to a final port of discharge in the United States, for a term of time not exceeding 12 (twelve) calendar months" may recover wages until the expiration of twelve months from the date he joined the ship rather than to the end of the voyage.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of R. S. 4511 as amended, 46 U. S. C. 564, and the Secretary of the Navy's order of March 6, 1942, waiving compliance therewith, 46 C. F. R. (1943 Supp.), Appendix A, p. 2080, 7 F. R. 2477, are set forth in the Appendix, *infra*, pp. 14–15.

STATEMENT

Petitioner, a Government-employed merchant seaman, brought suit in admiralty against the United States and others to recover damages under the Jones Act (41 Stat. 1007, 46 U. S. C. 688), and maintenance, cure and wages under the federal maritime law (R. 2, 5–17). Petitioner's suit was based upon injuries received at Palermo, Sicily, on February 5, 1944, when he fell into a drydock in the course of returning to his ship,

the S. S. *James E. Haviland,* from authorized shore leave. As a result of this accident, petitioner became permanently blind, suffers headaches, and is subject to occasional epileptic seizures (R. 266, 289). There is no need herein to set forth in detail the circumstances surrounding petitioner's accident since both courts below have held, upon a careful review of all the evidence, that it was occasioned by petitioner's own conduct and was not attributable to any negligence on the part of his ship or those in charge of her (R. 263–266, 285). Both courts below accordingly denied petitioner's claim for damages under the Jones Act and petitioner does not here challenge their ruling (Pet. 2). He does, however, challenge their rulings as to his claims for maintenance, cure and wages.

Petitioner was hospitalized in various Government hospitals from the date of his injury until June 30, 1944, at which time he was discharged at Norfolk, Virginia, as completely disabled (R. 266, 287–288). As to petitioner's condition, both courts below found that he had received the maximum cure that medical and surgical aid could accomplish (R. 266, 286–289). The specific issue herein as to future maintenance and cure stems from petitioner's claim for a lump sum award in the amount of $50,000 (R. 14, 15). Petitioner did not adduce, in support of his claim, any evidence as to the anticipated need for medical treatment or its cost or the cost of maintenance while

undergoing such treatment. The district court denied this claim, but awarded petitioner maintenance for six months after his discharge from the hospital at Norfolk as a reasonable allowance of maintenance, as well as an amount to cover petitioner's expenses incurred up to the time of trial for medicine and private medical care (R. 254–255, 266–267). This award was affirmed by the court below (R. 288, 289).

Petitioner's suit also embraced a claim for wages from March 28, 1944, when his ship completed her voyage, until December 16, 1944, the end of the 12-month period from the date on which he joined the ship (Pet. 16–21). Petitioner was not one of those who joined the *Haviland* at the outset of her voyage but signed on from the War Shipping Administration's Replacement Pool at Naples, Italy, on December 16, 1943 (R. 257). Both courts below limited petitioner's recovery of wages to the duration of the voyage (R. 259, 267, 285).

ARGUMENT

1. As his first point petitioner contends that he was injured in the service of the ship, and that therefore under the decision of this Court in *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, the courts below should have applied a "more liberal" rule of maintenance and cure (Pet. 10–16). Although no statement in the petition indicates what petitioner believes that more liberal rule should

be, it is apparent from the *ad damnum* in the libel and from petitioner's contentions in the courts below that what he seeks is a lump sum award, as maintenance and cure for life (R. 14, 15, 286). Despite the doubts expressed by the court below as to the interpretation of certain expressions in the *Calmar* opinion, we believe that this Court there held without qualification, as the court below clearly understood, that a lump sum award in anticipation of a future need for maintenance and cure was improper.

In *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, the seaman was suffering from an incurable disease which tended to be progressive, although care and treatment at frequent intervals, with periodic medical observation, were of aid in arresting its progress. The trial court held that the seaman was entitled to recover the cost of maintenance and medical treatment so long as such treatment was necessary, and, as his affliction was incurable, it entered a decree for a lump sum award based on his life expectancy. This decree was affirmed by the Third Circuit. On certiorari, the question for decision, as stated in the opinion by Mr. Justice Stone, was "whether the duty of a ship owner to provide maintenance and cure for a seaman falling ill of an incurable disease while in its employ extends to the payment of a lump sum award sufficient to defray the cost of maintenance and cure for the remainder of his life." 303 U. S. at 526.

E. Haviland followed the prescribed form, and described the voyage as "from the Port of Philadelphia, to a point in the Atlantic Ocean to the eastward of Phila. and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any department, commission or agency thereof * * * and back to a final port of discharge in the United States, for a term of time not exceeding 12 (twelve) calendar months" (Ex. 3).

Petitioner contends that the right to wages extended for twelve months from the date he joined the vessel, since he was under "a legal obligation to serve for twelve months, if required by the respondents" (Pet. 19). The language of the articles, however, shows plainly that petitioner's only obligation was to serve until the ship returned "to a final port of discharge in the United States," which should not exceed twelve months. Thus, the duration of the crew's legal obligation to serve was not fixed absolutely at twelve months, for the obligation was terminated when the voyage ended by the return of the ship "to a final port of discharge in the United States." Certainly none of the crew would have violated his contract by quitting the ship after the termination of its voyage at New York on March 28, 1944. *The Edwin*, 23 Fed. 255 (S. D. N. Y.).

There is no contractual basis, therefore, for a contention that the ship's obligation to pay wages

continued after that time. As a practical matter, petitioner fails to recognize the distinction between articles for a foreign voyage and those used in the coastwise trades. Since coastwise voyages are comparatively short, the articles are written to cover one or more voyages, for a term not to exceed a specified number of months, commonly with the right in either party to terminate on notice at the end of any voyage. Where a seaman employed under such articles is injured, the ship owner is not permitted to take an unconscionable advantage of him by terminating his employment at the end of the next voyage, but the employment is considered as continuing for the entire term of the articles. *Jones v. Waterman S. S. Corporation,* 155 F. 2d 992, 996 (C. C. A. 3); *Enochasson* v. *Freeport Sulphur Co.,* 7 F. 2d 674 (S. D. Tex.); *McCarron* v. *Dominion Atlantic Ry. Co.,* 134 Fed. 762 (D. Mass.). On the other hand, foreign articles cover only a single voyage to be terminated at a final port of discharge, the maximum time limit for the voyage being inserted for the protection of the seamen.[2] Under foreign articles, the term of employment is therefore the single voyage, ending at the final port of discharge, and not the period of time provided as

[2] Petitioner argues that the word "voyage" is not used in the articles, and that the court below erred in deciding this case as though that word had been used (Pet. 17). However, the language being construed by the Court of Appeals was that inserted in the portion of the shipping articles as to which Note 1 of the articles provided (Ex. 3): "Here the

This Court there held that, although the duty of maintenance and cure was not limited by the duration of the voyage, the award of a lump sum in anticipation of the expense of future maintenance and cure for an indefinite period was improper, and that recovery must be measured by the reasonable cost of that maintenance and cure to which the claimant is entitled at the time of trial, including, where appropriate, amounts needful for maintenance and cure of a kind and for a period in the immediate future which can be definitely ascertained. The Court expressed the view that it could "find no support * * * for holding that [the duty to furnish maintenance and cure] imposes on the ship owner an indefinitely continuing obligation to furnish medical care to a seaman afflicted with an incurable disease, which manifests itself during his employment, but is not caused by it," and it could "find no basis for saying that, if the disease proves to be incurable, the duty extends beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care, and medical treatment." The suggestion was made that those cases where the incapacity was caused by the employment might be thought to require a more liberal application of the rule. 303 U. S. at 530.

Upon this *dictum*, petitioner bases his claim to maintenance and cure for life. Petitioner contends that the Court's suggestion of "a more

liberal application of the rule" refers to the rule that a lump sum award to anticipate future maintenance and cure is improper, rather than to the discussion of the circumstances in which a seaman might be entitled to maintenance and cure beyond the termination of the voyage (Pet. 12–13).

Without analyzing the reasoning by which petitioner reaches this conclusion, it is sufficient to observe that petitioner's interpretation is inconsistent with the rationale of the *Calmar* decision. In that case, the lump sum award to cover the cost of maintenance and cure for life was reversed by this Court on three grounds: because (1) the amount and character of the future medical care required cannot be measured by mortality tables; (2) in the marine hospital service the seaman may be treated without expense or in some cases at minimum expense; and (3) the necessity of safeguarding the seaman in case of illness against the consequences of his own improvidence is not met by the payment of a lump sum to cover expenses for medical care during life. 303 U. S. at 530–531. All three of these reasons require the rejection of petitioner's claim. It is impossible now to calculate the cost of whatever medical treatment petitioner may require in the future and there is no reason to believe that such medical care cannot be had through the marine hospital service. As this Court pointed out, a lump sum payment to defray the cost of future

medical treatment cannot serve as a performance of the duty to safeguard the seaman against the consequences of possible improvidence. The courts below awarded petitioner all sums for maintenance and cure to which he was entitled at the time of the trial. We submit that his claim for a lump sum award for future maintenance and cure is contrary to the decision of this Court in the *Calmar* case.

The hardship on petitioner in this case, which we recognize, flows from the fact that seamen and their representatives "Wisely or unwisely, * * * have steadfastly preferred the traditional remedy of jury trial for negligence to workmen's compensation based on liability without fault." *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, 715. The seamen's composite remedy is his right of action under the Jones Act, his general maritime cause of action for unseaworthiness, and the narrow adjunct of these two major remedies, "the historic relief afforded by the general maritime law for maintenance and cure." *Hust* v. *Moore-McCormack Lines,* 328 U. S. at 715–716. Here, petitioner cannot establish negligence or unseaworthiness. In confining relief to maintenance and cure within the limits of its traditional applicability, the courts below herein have given petitioner all to which he is entitled. The present application is in substance a request that this Court now give petitioner, as maintenance and cure, the equivalent of the general damages which he can-

not here recover because of the absence of fault on the part of the ship and her owners, or that maintenance and cure be expanded to afford the full permanent disability benefits to which seamen might be entitled under a statutory workmen's compensation system.[1] We submit that the solution for the plight represented by petitioner's unique case lies only in enactment of comprehensive workmen's compensation legislation.

2. Petitioner's claim for wages rests upon a clearly erroneous construction of his shipping articles. R. S. 4511 as amended, 46 U. S. C. 564, requires that shipping articles shall describe the nature and, as far as practicable, the duration of the intended voyage, and the port at which it is to terminate. During the war, it was undesirable to disclose the description of voyages on which a ship was preparing to set out and, under the authority of emergency war powers, the Secretary of the Navy waived compliance with this requirement of R. S. 4511 and prescribed the form of voyage description to be used. See Appendix, *infra*, pp. 14–15. The articles of the S. S. *James*

[1] Petitioner's prayer for maintenance and cure in the amount of $50,000 illustrates the nature of the request (R. 14, 15). As we have noted above, *supra*, pp. 3–4, there is no evidence in the record as to his need for future medical treatment, its duration or expense in support of this demand. The only evidence adduced by petitioner was a showing, by mortality tables, of a 40.17-year life expectancy (R. 110). The amount of maintenance and cure demanded appears to result from multiplying this life expectancy by a fixed per diem allowance.

its maximum limit.[3] *The Thomas Tracy*, 24 F. 2d 372, 374 (C. C. A. 2); *The Ipswich*, 46 F. 2d 136, 138 (D. Md.); *Pell v. American-West African Line, Inc.*, 1939 A. M. C. 346 (S. D. N. Y.); *The Falls of Keltie*, 114 Fed. 357, 359 (D. Wash.). This is in keeping with the traditional reluctance of seamen to bind themselves to contracts for stated periods of time, particularly long periods of time, and their preference to be through with a vessel when a long voyage ends.

R. S. 4517, 46 U. S. C. 570, and Section 19 of the Act of June 26, 1884, 23 Stat. 58, 46 U. S. C. 572, cited by petitioner (Pet. 17), do not support his contentions. There is nothing in this record to show that petitioner was not engaged in the presence of the proper official as required by the statutes, or that petitioner's rights have been prejudiced in any way by any failure to comply with their provisions. The meaning of the term "final port of discharge" as used in shipping

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nature of the voyage is to be described, and the places named at which the ship is to touch; or, if that cannot be done, the general nature and probable length of the voyage is to be stated, and the port or country at which the voyage is to terminate."

It is clear, therefore, that the language referred to was a *voyage description*, even though it did not include the word "voyage."

[3] The case of *Shields v. United States*, 73 F. Supp. 862 (E. D. Pa.), on which petitioner relies, does support his contention that the articles here involved should be construed as entitling him to wages for the full twelve months. An appeal from that decision is now pending in the United States Court of Appeals for the Third Circuit.

articles is well settled. It means that port at which the vessel is completely relieved of her cargo and thus becomes ready for another venture. *The Larimer*, 174 Fed. 429 (E. D. Pa.); *Schermacher* v. *Yates*, 57 Fed. 668 (E. D. N. Y.). This being true, we submit that there was no ambiguity in the articles, and that the court below was clearly correct in holding that petitioner's term of employment ended on March 28, 1944, with the termination of the voyage of the *Haviland* at New York.

CONCLUSION

The judgment of the court below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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NOVEMBER 1948.

APPENDIX

Statute and Regulation Involved

1. R. S. 4511 as amended, 46 U. S. C. 564, provides in pertinent part:

> The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars:
>
> First. The nature and, as far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate.
>
> * * * * *

2. The Secretary of the Navy's order of March 1942, waiving compliance with certain of the provisions of R. S. 4511 as amended, 46 C. F. R. 1943 Supp.), Appendix A, p. 2080, 7 F. R. 2477, provides:

DESCRIPTION OF VOYAGE IN SHIPPING ARTICLES

By virtue of the authority vested in me by the provisions of Executive Order No. 8976, dated December 12, 1941 and Executive Order No. 9083, dated February 28, 1942 (3 CFR Cum. Supp.), I hereby waive compliance with the provisions of section 4511 R. S. as amended (46 U. S. C. 564), and section 2 of the act of June 19, 1886, as amended (46 U. S. C. 563), to the extent hereinafter set forth:

(1) So much of section 4511 R. S. as amended, and section 2 of the act of June 19, 1886, as amended, as requires shipping articles to contain, in writing or in print, particulars as to the nature of the intended voyage or engagement is waived: *Provided*, That,

(a) The description of voyages on articles of agreement signed covering the departure of vessels of all categories from United States ports shall read:

To a point in the * Ocean to the ** of *** and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any Department, Commission or agency, thereof, and back to a final port of discharge **** in the United States **** for a term of time not exceeding ——— calendar months.

*Name of ocean.

**Westward, eastward, southward, or northward.

***Name of port (New York, San Francisco, etc.).

****Here may be inserted, if desired, such stipulations as: "And/or first loading port and/or bunkering port, and the locality where the voyage is to terminate".

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